

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES )

v. )

MANNING, Bradley E., PFC )

U.S. Army, (b) (6) )

Headquarters and Headquarters Company, U.S. )

Army Garrison, Joint Base Myer-Henderson Hall, )

Fort Myer, VA 22211 )

**DEFENSE MOTION FOR  
APPROPRIATE RELIEF UNDER  
MILITARY RULE OF  
EVIDENCE 505**

DATED: 17 February 2012

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to R.C.M. 906 and Military Rule of Evidence (M.R.E.) 505 for a preliminary Article 39(a) session to consider matters relating to classified information that may arise in connection with the court-martial. Specifically, the Defense requests that the Court issue a Protective Order under M.R.E. 505(g)(1), establish timing for discovery and notice under M.R.E. 505(h), and obtain clarification from the Original Classification Authority (OCA) for Specification 3 and 15 of Charge II regarding the scope of its classification determination on referencing the OCA within court filings or open court.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32

Investigating Officer. The charges were referred without special instructions to a general court-martial on 3 February 2012.

5. On 14 February 2012, the Defense filed three separate motions along with an *ex parte* supplement to one of its motions. Shortly after filing the Defense motions, Captain (CPT) Ashden Fein sent an email to the Defense requesting an immediate telephone conversation. During that conversation, CPT Fein asserted that the Defense was in apparent violation of a footnote in an OCA's classification determination regarding Specification 3 and 15 of Charge II. The prohibition restricts mentioning the OCA's organization by name in conjunction with charged specifications in this case.

6. As previously stated, the Defense did not, in any of its submissions, reference the organization's name in conjunction with any of the charged offenses. However, the Government believed that because the Defense referred to the organization's review of "charged information," this runs afoul of the classification determination and therefore constitutes spillage. The telephone conversation ended with the Defense telling CPT Fein that it believed his interpretation was an arbitrary one and inconsistent with the Defense security experts' opinion.

7. The following day, CPT Fein sent an email to the Court and all parties requesting that the Defense's email not be forwarded and the attached documents not saved. At the time, the Government believed one of the documents contained classified information. Later that day, the Government pointed to another Defense motion as also potentially containing classified information. Based upon the Government's unilateral interpretation that spillage had occurred, (b) (6) the Military District of Washington, J6, Information Assurance Manager, directed all parties to take curative steps.

8. It is important to note that even the Government concedes that the Defense did not mention the organization's name in reference to a particular specification, as prohibited by the footnote. The Government simply believes that the Defense's submission could lead a reasonable person to the classified information. Under the Government's position, if a reasonable person could infer an association between the organization and certain specifications, there is a spillage of classified information. To use an analogy to better elucidate this point, assume that the mention of "Shakespeare" in conjunction with "Romeo and Juliet" was classified, though neither the mention of Shakespeare nor Romeo and Juliet alone is classified. Further assume that Shakespeare has already publicly announced that he wrote Romeo and Juliet. In the Defense's motions, it did not mention Shakespeare in association with Romeo and Juliet. At most, it mentioned Shakespeare in conjunction with "star-crossed lovers." Because a reasonable person could infer that "star-crossed lovers" refers to Romeo and Juliet, and because Romeo and Juliet is not permitted to be mentioned in association with Shakespeare, this (according to the Government) constitutes disclosure of classified information. What if the Defense had referred not to star-crossed lovers, but simply "lovers"? What if it had referred to a "story featuring the Montague's and Capulet's"? What if it had referred to a "tragic love story"? What if it had referred to "poisoning"? The point is that the Defense cannot, by any stretch of the imagination, anticipate what the Government, in its unilateral discretion, will deem to be prohibited under the footnote. The Defense interprets the prohibition in the relevant footnote as prohibiting the use of "Shakespeare" and "Romeo and Juliet" – nothing more. That the Government attempts to strain

this interpretation to the point of absurdity demonstrates the need for clarification in this matter. Moreover, the Defense reiterates its position that: a) the OCA's classification determination in this respect (i.e. the footnote prohibiting the use of "Shakespeare" and "Romeo and Juliet") is not a valid one because it fails to comply with the requirements of Executive Order 13526; b) the unnamed organization's own public statements linking "Shakespeare" and "Romeo and Juliet" are inconsistent with its own apparent prohibition.

9. The Government's expansive (and in the view of the Defense, untenable) reading of the referenced OCA's footnote demonstrates the need for a Protective Order providing for a neutral review of all party submissions. It also demonstrates the need for the relevant OCA to testify as to what is, and is not, permitted with respect to the naming of this particular organization. The Defense could never have anticipated that the Government would deem anything in its motions to constitute spillage of classified information, necessitating onerous sanitation measures. The Government's interpretation of the OCAs footnote places the Defense and the Court at too great of risk for future incidents of this nature.

#### WITNESSES/EVIDENCE

10. The Defense requests the following witnesses be produced in support of this motion:

- a. OCA for Specification 3 and 15 of Charge II;
- b. Mr. Jay Prather, Court Security Officer

#### LEGAL AUTHORITY AND ARGUMENT

11. After referral of charges, "any party may move for a session under Article 39(a) to consider matters relating to classified information." M.R.E. 505(e). After such a motion, "the military judge promptly shall hold a session under Article 39(a) to establish the timing of requests for discovery, the provisions of notice under subdivision (h), and the initiation of the procedure under subdivision (i)." *Id.*

12. The Defense requests this hearing to establish Defense notice requirements under M.R.E. 505(h), the timeline for any proceedings that may be necessary under M.R.E. 505(i), and the issuance of a Protective Order to govern the handling of classified information in this case under M.R.E. 505(g)(1).

13. Under M.R.E. 505(h), the Defense is required to provide the Government notice if the Defense reasonably expects to disclose or cause the disclosure of classified material in any manner during the court-martial process. The Defense will provide the required notice so that the Government can ensure that the proper documentation is obtained and requested in order that the courtroom can be properly closed for any Defense-requested disclosure of classified information.

14. Based on the inherent difficulty in dealing with classified information during the court-martial process, something that we have already seen with the Defense submissions on 14 February 2012, the Defense requests that a hearing be held to establish the requirements of M.R.E. 505(h) and 505(i). The Defense also moves pursuant to M.R.E. 505(g)(1) for the issuance of a Protective Order to govern the handling of classified information in this case.

15. Under M.R.E. 505(g)(1), a military judge is required to enter a Protective Order to guard against the compromise of information disclosed to the Defense. The rule provides an example of various provisions that a Protective Order may include. *Id.* These provisions, however, are only meant as guidelines for a military judge, and are not absolute requirements. Although the rule envisions that the Government will make a request for a Protective Order, nothing prohibits the Defense from proactively taking steps to assist the Court in this regard.

16. In the instant case, the Defense seeks the issuance of a Protective Order that will avoid a reoccurrence of the 14 February 2012 “spillage” of classified information. Here, the Defense seeks the issuance of a Protective Order seeking the terms set forth in M.R.E. 505(g)(1), as well as other measures which it believes are necessary to protect classified information and ensure an efficient and effective court-martial process.

17. The Defense has drafted a proposed Protective Order. The proposed Protective Order is attached to this motion.

18. If the Defense motion is opposed by the Government, then the Defense requests oral argument.

#### CONCLUSION

19. Based on the above, the Defense requests that the Court issue the attached Protective Order.

Respectfully submitted,



DAVID EDWARD COOMBS  
Civilian Defense Counsel